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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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LAVADA E. KIDWELL,)
Plaintiff,) No. CV-11-328-JPH
v.) ORDER GRANTING DEFENDANT'S
CAROLYN W. COLVIN¹, Acting) MOTION FOR SUMMARY JUDGMENT
Commissioner of Social Security,)
Defendant.)
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BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 13, 20. Attorney Maureen J. Rosette represents plaintiff. Special Assistant United States Attorney Terry E. Shea represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment, **ECF No. 20.**

JURISDICTION

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¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 Kidwell applied for disability insurance benefits (DIB) on
2 June 11, 2009, alleging disability since July 3, 2008 (Tr. 126-
3 28). Kidwell alleged she is unable to work due solely due to
4 physical limitations: back problems and chronic pain (Tr. 147).
5 The application was denied initially and on reconsideration (Tr.
6 70-72, 77-78).

7 On June 30, 2010, Administrative Law Judge (ALJ) Gene Duncan
8 held a hearing. Ms. Kidwell, represented by counsel, her spouse
9 and a vocational expert testified (Tr. 32-67). On September 23,
10 2010, the ALJ issued an unfavorable decision (Tr. 11-25). The
11 Appeals Council denied review on August 22, 2011 (Tr. 1-3), making
12 the ALJ's decision the final decision of the Commissioner and
13 appealable to the district court pursuant to 42 U.S.C. § 405(g).
14 Kidwell filed this action for judicial review on September 9,
15 2011. ECF Nos. 2, 4.

16 **STATEMENT OF FACTS**

17 The facts have been presented in the administrative hearing
18 transcripts, the ALJ's decision, and the briefs of the parties.
19 They are only briefly summarized here.

20 Ms. Kidwell was 45 years old at onset and 47 on the date of
21 the ALJ's decision. She graduated from high school worked as a
22 housekeeper for 15 years prior to onset. She testified she stopped
23 working because she twisted her back at work and has ongoing lower
24 back pain.

25 Kidwell lives with her spouse. She takes no medication
26 because there is no money to pay for it. She waters plants, drives
27 short distances, shops, fishes once a month with her spouse, reads
28 and visits family. Pain causes sleep problems. She can lift ten

1 pounds, stand 20 minutes and sit 30 minutes. Sometimes her hands
 2 and legs become numb. Kidwell did not allege any mental
 3 impairments or limitations when she applied for benefits (Tr. 20,
 4 23, 34, 36-38, 41-42, 44, 46-47, 50, 52-53, 60-61, 148, 155, 181).

5 **SEQUENTIAL EVALUATION PROCESS**

6 The Social Security Act (the Act) defines disability as the
 7 "inability to engage in any substantial gainful activity by reason
 8 of any medically determinable physical or mental impairment which
 9 can be expected to result in death or which has lasted or can be
 10 expected to last for a continuous period of not less than twelve
 11 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
 12 provides that a Plaintiff shall be determined to be under a
 13 disability only if any impairments are of such severity that a
 14 plaintiff is not only unable to do previous work but cannot,
 15 considering plaintiff's age, education and work experiences,
 16 engage in any other substantial gainful work which exists in the
 17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
 18 the definition of disability consists of both medical and
 19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
 20 (9th Cir. 2001).

21 The Commissioner has established a five-step sequential
 22 evaluation process for determining whether a person is disabled.
 23 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
 24 is engaged in substantial gainful activities. If so, benefits are
 25 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
 26 the decision maker proceeds to step two, which determines whether
 27 plaintiff has a medically severe impairment or combination of
 28 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares plaintiff's impairment with a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, plaintiff is conclusively presumed to be disabled. If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents plaintiff from performing work which was performed in the past. If a plaintiff is able to perform previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) assessment is considered. If plaintiff cannot perform this work, the fifth and final step in the process determines whether plaintiff is able to perform other work in the national economy in view of plaintiff's residual functional capacity, age, education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon plaintiff to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once plaintiff establishes that a physical or mental impairment prevents the performance of previous work. The burden

1 then shifts, at step five, to the Commissioner to show that (1)
 2 plaintiff can perform other substantial gainful activity and (2) a
 3 "significant number of jobs exist in the national economy" which
 4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 5 Cir. 1984).

6 STANDARD OF REVIEW

7 Congress has provided a limited scope of judicial review of a
 8 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 9 the Commissioner's decision, made through an ALJ, when the
 10 determination is not based on legal error and is supported by
 11 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
 12 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 13 "The [Commissioner's] determination that a plaintiff is not
 14 disabled will be upheld if the findings of fact are supported by
 15 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
 16 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
 17 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
 18 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
 19 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 20 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 21 573, 576 (9th Cir. 1988). Substantial evidence "means such
 22 evidence as a reasonable mind might accept as adequate to support
 23 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
 24 (1971)(citations omitted). "[S]uch inferences and conclusions as
 25 the [Commissioner] may reasonably draw from the evidence" will
 26 also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.
 27 1965). On review, the Court considers the record as a whole, not
 28 just the evidence supporting the decision of the Commissioner.

¹ *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to
4 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
5 evidence supports more than one rational interpretation, the Court
6 may not substitute its judgment for that of the Commissioner.
7 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
8 (9th Cir. 1984). The court will set aside a denial of benefits
9 only if it is not supported by substantial evidence or is based on
10 legal error. *Berry v. Astrue*, 622 F.3d 1228, 1231 (9th Cir. 2012).
11 Even if the ALJ erred, the court will uphold the decision so long
12 as the error was harmless. *Lockwood v. Comm'r Soc. Sec. Admin.*,
13 616 F.3d 1068, 1071 (9th Cir. 2010)(citation omitted).

If there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ALJ'S FINDINGS

20 ALJ Duncan found Kidwell was insured through September 30,
21 2010. At step one, the ALJ found Kidwell did not work after onset
22 (Tr. 11, 13-14). At steps two and three, he found she suffers from
23 the severe impairments of chronic lumbar sprain not lasting 12
24 continuous months superimposed on mild degeneration of the lumbar
25 spine, and borderline intellectual functioning, impairments that
26 are severe but do not meet or medically equal any listed
27 impairments (Tr. 13, 18). The ALJ found Kidwell less than fully
28 credible (Tr. 21), a finding unchallenged on appeal. He found she

1 is able to perform a range of light work (Tr. 19-20). At step
 2 four, relying on a vocational expert's testimony, the ALJ found
 3 Kidwell is unable to perform her past relevant work as a
 4 housekeeper (Tr. 23). At step five, again relying on the VE, the
 5 ALJ found Kidwell is able to perform other jobs, such as small
 6 parts assembly and small part product inspector (Tr. 24). The ALJ
 7 found Kidwell has not been under a disability, as defined by the
 8 Social Security Act, from onset on July 3, 2008, through September
 9 23, 2010, the decision date (Tr. 24-25).

10 ISSUES

11 Kidwell alleges that if the ALJ properly credited the
 12 opinions of two examining psychologists, he would have found she
 13 is disabled, or, at a minimum found greater limitations requiring
 14 remand. ECF No. 14 at 10-15. The Commissioner asserts the decision
 15 should be affirmed because it is supported by substantial evidence
 16 and free of harmful legal error. ECF No. 20 at 5.

17 DISCUSSION

18 A. Weighing medical evidence

19 In social security proceedings, the claimant must prove the
 20 existence of a physical or mental impairment by providing medical
 21 evidence consisting of signs, symptoms, and laboratory findings;
 22 the claimant's own statement of symptoms alone will not suffice.
 23 20 C.F.R. § 416.929.

24 A treating physician's opinion is given special weight
 25 because of familiarity with the claimant and the claimant's
 26 condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9th Cir. 1989).
 27 However, the treating physician's opinion is not "necessarily
 28 conclusive as to either a physical condition or the ultimate issue

1 of disability." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
 2 1989)(citations omitted). More weight is given to a treating
 3 physician than an examining physician. *Lester v. Chater*, 81 F.3d
 4 821, 830 (9th Cir. 1995). Correspondingly, more weight is given to
 5 the opinions of treating and examining physicians than to
 6 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
 7 (9th Cir. 2004). If the treating or examining physician's opinions
 8 are not contradicted, they can be rejected only with clear and
 9 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
 10 ALJ may reject an opinion if he states specific, legitimate
 11 reasons that are supported by substantial evidence. See *Flaten v.*
 12 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
 13 1995).

14 In addition to the testimony of a nonexamining medical
 15 advisor, the ALJ must have other evidence to support a decision to
 16 reject the opinion of a treating physician, such as laboratory
 17 test results, contrary reports from examining physicians, and
 18 testimony from the claimant that was inconsistent with the
 19 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
 20 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
 21 Cir. 1995).

22 **B. Examining psychologists**

23 *Dennis Pollack, Ph.D.*

24 Kidwell alleges the ALJ's reasons for rejecting Dr. Pollack's
 25 contradicted opinion are not specific, legitimate and supported by
 26 substantial evidence. She alleges the ALJ rejected the opinion
 27 because (1) it was sought by plaintiff's attorney and (2) the
 28 assessed limitations are inconsistent with both the longitudinal

1 record and with Pollack's narrative ECF No. 14 at 13-14.

2 The Commissioner responds that all but one of the ALJ's
 3 reasons are proper and supported by substantial evidence. Proper
 4 reasons include: (1) Pollack's narrative report does not explain
 5 why marked limitations were assessed; (2) the assessed marked
 6 limitation in the ability to maintain a schedule and be punctual
 7 is contradicted by Kidwell's own report she was "very reliable"
 8 and filled in for coworkers when needed; (3) the assessed marked
 9 limitations are inconsistent with Kidwell's demonstrated overall
 10 functioning ability and (4) Kidwell did not allege mental problems
 11 when she applied for benefits. ECF No. 20 at 11, 16-17; Tr. 316.

12 The Commissioner concedes the ALJ erred when he relied on the
 13 factor that "claimant's attorney is known to continually seek Dr.
 14 Pollack's favorable reporting," because it relies on evidence
 15 outside the record, EFC No. 20 at 17, but asserts the error is
 16 harmless. Because the ALJ's other reasons are valid and supported,
 17 the Commissioner continues, his decision should be affirmed. ECF
 18 No. 20 at 17-19.

19 The ALJ considered Kidwell's credibility when he assessed the
 20 conflicting evidence. As noted she does not challenge the finding
 21 on appeal. Although failure to challenge an ALJ's negative
 22 credibility finding on appeal waives any challenge, *Carmickle v.*
Comm'r of Soc. Sec. Admin., 533 F.3d 1155, 1161 n.2 (9th Cir.
 23 2008), the court discusses the ALJ's credibility assessment in
 24 order to clarify its decision.

25 The ALJ relied on daily activities, inconsistent statements
 26 and lack of supporting objective evidence when he found Kidwell
 27 less than fully credible. His reasons are clear, convincing and

1 supported by substantial evidence (Tr. 20-21).

2 The record reveals a wide range of activities that undermine
3 allegedly severe limitations. Kidwell painted the interior of all
4 of the rooms in her house. She and her spouse were active in their
5 church. She swept, did laundry and dishes, went fishing once a
6 month, and crocheted, despite complaints of debilitating back pain
7 (Tr. 21; 226, 321-22). Daily activities inconsistent with alleged
8 limitations constitute a convincing reason to find a claimant less
9 than credible. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
10 2001).

11 Kidwell inconsistently described her back injury, as the ALJ
12 notes (Tr. 21). Initially, Kidwell stated she was working as a
13 housekeeper on July 3, 2008, making beds. After she went home, she
14 picked up something from the carpet and began having sudden back
15 pain that increased in the lower left back and has persisted since
16 that time (Tr. 222-23). She sought treatment July 7th and July 25,
17 2008. At the latter appointment, Kidwell repeated three separate
18 times that the injury occurred at home (Tr. 195, 223). At a
19 medical examination on March 12, 2009, Kidwell said she was
20 carrying a large load of laundry downstairs at work on July 3,
21 2008. Her head was turned and "and she noted a loud painful snap
22 in her left low back." She finished her shift at work. When
23 Kidwell got home, she bent over to pick up a feather. She noted
24 pain and weakness "with her left leg going out" (Tr. 225). The ALJ
25 notes Kidwell's numerous additional inconsistent statements,
including the length of her two marriages (Tr. 21). The ALJ is
permitted to consider inconsistent statements when weighing
credibility. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir.

1 2002).

2 The objective evidence does not support Kidwell's complaints
3 (Tr. 21). As one example, the ALJ notes Kidwell has complained of
4 arm and leg numbness, yet no objective evidence supports these
5 complaints. No altered sensation or strength is noted in any of
6 the medical examinations (Tr. 21); see Tr. 195, 197, 230, 235-37,
7 311. Although lack of medical evidence cannot form the sole basis
8 for discounting pain testimony, it is a factor that the ALJ can
9 consider when analyzing credibility. *See Burch v. Barnhart*, 400
10 F.3d 676, 680 (9th Cir. 2005).

11 With respect to Pollack's opinion, the Commissioner is
12 correct. The ALJ's remaining reasons for discounting assessed
13 marked limitations are specific, legitimate and supported by
14 substantial evidence. Kidwell testified she does not believe she
15 has mental problems. As the ALJ notes, she was able to work as a
16 housekeeper for 15 years and was punctual. She cared for her own
17 and her family's needs for a number of years between her first and
18 second marriages (Tr. 22, 321). All indicate a much greater degree
19 of functioning than assessed by Dr. Pollack. The ALJ relied on
20 more than "boilerplate" when he rejected Dr. Pollack's assessed
21 marked limitations. The ALJ's error if any in relying on the
22 reason for Dr. Pollack's opinion, the referral by Kidwell's
23 attorney, is clearly harmless.

24 *Allen Bostwick, Ph.D.*

25 Kidwell alleges the ALJ failed to give reasons for rejecting
26 some of the limitations assessed by examining and consulting
27 psychologist Dr. Bostwick. Specifically, Kidwell alleges the ALJ
28 should have adopted Bostwick's assessed (1) moderate limitations

1 in daily living; (2) "limitation" to work "more independently or
2 in proximity to others but not directly with the public" and (3)
3 mild to moderate limitation with regard to attention,
4 concentration, pace and persistence. ECF No. 14 at 14, referring
5 to Tr. 330-31.

6 The Commissioner answers that Dr. Bostwick felt Kidwell's
7 primary limitation would probably relate to complaints of chronic
8 back pain rather than mental limitations. ECF No. 20 at 19; Tr. 23
9 and 331. Bostwick attributed moderate limitations in daily living
10 "primarily to her inability to manage her finances independently"
11 Tr. 331. The ALJ rejected this finding because it was inconsistent
12 with Kidwell's admitted ability to function on her own and to
13 perform basic math (Tr. 23, 35). The Commissioner is correct.

14 The Commissioner asserts Bostwick's opinion Kidwell would do
15 best working away from the public is a recommendation, not an RFC
16 assessment. As such, the ALJ was not required to include it in his
17 own RFC. ECF No. 20 at 20-21, citing *Valentine v. Comm'r Soc. Sec.*
18 Admin., 574 F.3d 685, 691-92 (9th Cir. 2009). The Commissioner is
19 correct. Moreover, the ALJ's limitation to superficial public
20 contact is consistent with Kidwell's record of functioning and
21 fully supported by the record as a whole. There was no error.

22 Last, Dr. Bostwick opined Kidwell would have mild to moderate
23 limitations in attention, concentration, persistent and pace (Tr.
24 331). The Commissioner accurately observes the ALJ took this into
25 account. The ALJ found borderline intellectual functioning severe
26 at step two. He assessed an RFC limited to simple, routine work
27 with no executive decision making required, expect the worker to
28 be off task 5.5% of the work day, and to work at a low-average

pace. ECF No. 20 at 21, Tr. 20. The ALJ based his step five finding on the vocational expert's testimony which incorporated these limitations. Importantly, Kidwell cites no additional limitations the ALJ should have taken into account when translating Bostwick's pace limitations.

The ALJ properly accepted and incorporated limitations established by the evidence.

A claimant for social security benefits carries the burden of proving she is disabled. 42 U.S.C. § 423(d)(5)(A); *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

Kidwell fails to meet her burden of showing harmful error.

The trier of fact, and not the reviewing court, must resolve conflicts in the evidence and, if the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992); *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this Court finds the ALJ's decision is free of harmful legal error and supported by substantial evidence.

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

The District Court Executive is directed to file this Order, provide copies to the parties, enter judgment in favor of defendant, and **CLOSE** the file.

1 DATED this 14th day of March, 2013.
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JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE